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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1945

No. 320

FEDERAL TRADE COMMISSION,

*Petitioner,*

*v.*

A. P. W. PAPER COMPANY, INC.,

*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The "question presented" as stated in the petition does not accurately set forth the question actually presented. The petitioner says that the question is whether the Act of January 5, 1905, as amended in 1910, excepts pre-1905 users of the Red Cross words and symbol from the prohibitions of the Federal Trade Commission Act, as amended. The Court below held that the two statutes should, if possible, be so construed as to give effect to both, and then held:

> "Both principles may be recognized in the case at bar by holding that the Red Cross Act gives the petitioner the right to continue to use the Red Cross words and symbol but the Federal Trade Commis-

sion Act empowers the respondent to prevent their use in a deceptive manner."

It thereupon remanded the cause to the Commission for further proceedings in accordance with its opinion. There have been no further proceedings. The Commission has never decided whether or not it could enter an order which would permit the respondent to continue to use the words and symbol and at the same time prevent their use in a manner that would violate the Federal Trade Commission Act.

## STATEMENT

The respondent's use of the trade name "Red Cross" goes back to 1897. The Commission did not find, nor is there a scintilla of evidence in the case, that the respondent by any word or act tried to lead people to believe that there was any connection with the American Red Cross Society. The case is one of mere naked user, and there is no question as to the power of the Commission to stop the respondent from doing anything beyond the mere use of the trade-mark.

The petition passes over lightly the significant current legislative history.

When Congress passed the Red Cross Act in 1905 and amended it in 1910, it recognized that the equities of existing users were sufficient to call for protection, and accordingly they were exempted from the prohibitions of Section 4. This exemption is now set forth in 36 USCA, Par. 4, as follows:

> "No person, corporation, or association that actually used or whose assignor actually used the said emblem, sign, insignia, or words for any lawful purpose prior to January 5, 1905, shall be deemed for-

bidden to continue the use thereof for the same purpose and for the same class of goods."

In 1919 a bill was introduced to eliminate the proviso, but after hearings Congress left the law unchanged. (Record fol. 1055)

In 1942 the issue of repealing the exemption was brought before Congress and the House Committee on Foreign Affairs held extensive hearings and took voluminous testimony. The Committee finally reported a bill to the House (H. R. 7420). This bill provided that the pre-1905 users "may continue to use" the Red Cross name and symbol to a specified date, with tapering-off provisions thereafter. The accompanying report* stated:

> "The provisions of the present law which permit certain persons to continue to use the Red Cross emblem and words and the White Cross emblem, without limitation as to time, are eliminated by Sections 1 and 2 of the bill."

This bill died, as the life of the House expired before it was taken up. The following year the Senate took up the same bill and referred it to its Committee on Judiciary, which held extensive hearings. It then reported the bill out to the Senate, accepting the principles of the House bill but making some changes in the language and the date when the prohibition should come into effect. This bill was passed by the Senate (S. 469). The Committee report** accompanying the bill to the Senate stated:

> "In January 1905, after the American National Red Cross had been reincorporated by an act of

*House Report No. 2387, 77th Congress, 2d Session, page 5.
**Senate Report No. 542, 78th Congress, 1st Session, page 2.

Congress, commercial exploitation of the Red Cross emblem was prohibited by Federal statute, but this law operated only as to persons and corporations which at that time were not 'lawfully entitled to use the sign of the Red Cross'.

* * *

"It was the opinion of the committee, after long hearings and much consideration, that legislation should be enacted to implement the treaty and to provide eventually that the use of the symbol and the words should be limited rigidly to the American Red Cross Society.

"It was recognized, however, that there have been good faith uses of the symbol. The bill as reported to the Senate, therefore, gives an opportunity for commercial users gradually to abandon the use by providing: First, that those who were lawfully entitled to the use of the Red Cross prior to the act of January 5, 1905, for commercial purposes might continue such use until July 1, 1947; * * *"

The bill then went to the House, where the Committee reported the bill favorably, with minor amendments. This Committee report,* dated December 11, 1944, in explaining the existing law and the reason for the proposed change, stated:

"Persons, corporations or associations that actually used or whose assignors actually used the Red Cross insignia or words for any lawful purpose prior to January 5, 1905, however, are expressly permitted to continue the use thereof for the same purpose and for the same class of goods.

"With the steady growth of the American Red Cross Society both as to membership and activities

*House Report No. 2054, 78th Congress, 2d Session, page 4.

> the significance of the symbol as the sign of international work for the relief of the wounded and the suffering became constantly better and better known.
> * * *
>
> "It was recognized, however, that under existing law there are legal uses of the symbol by commercial users. The Bill as reported, therefore, gives an opportunity for commercial users gradually to abandon the use of the symbol and name by providing: * * * "

Congress adjourned before the bill was reached on the calendar.

## REASONS FOR DENYING THE WRIT

### 1.

The question presented in this litigation is peculiarly one within the jurisdiction of Congress, where it is receiving full consideration. This current legislative history emphasizes that Congress has retained jurisdiction over dealing with the use of the Red Cross; that Congress regards the pre-1905 users as having the right still to do so; and that Congress is actively engaged in considering the respective equities to determine under what conditions and under what relief provisions it should terminate the right of pre-1905 users to continue the use of the Red Cross.

Neither the Federal Trade Commission nor anyone else at any time during the elaborate Congressional hearings ever suggested the construction of the Federal Trade Commission Act urged for the first time upon the Court below. Certainly Congress at no time has regarded itself as having given to anyone the power to terminate the rights of the pre-1905 users but is treating the matter as one solely with-

in its own competence and is giving it the appropriate consideration.

It may be noted that the bill passed by the Senate in 1944 and the two bills approved by the House Committee in 1942 and 1944 all refused to do that which the Commission seeks in this proceeding, viz. to terminate the right forthwith. They all continued the use unchanged for a number of years and then provided for a tapering-off period. In its further consideration of the problem the Congress will have before it the decision of the Court below in this case.

2.

The question presented is of very limited application.

The Chairman of the House Committee, which had had extended hearings in 1942 and again in 1944 on the bill to eliminate the exemption, stated at the hearing on May 23, 1944:

> "The Chairman would like to state I think there are only six, not more than six, that were legally entitled to use it before that date."

This was given in reply to a question raised as to how many pre-1905 users of the Red Cross label there now are. (See "Hearings before the Committee on Foreign Affairs, House of Representatives, on S.469", p. 60.)

Petitioner's suggestion (Brief, p. 13) that there are "literally hundreds" of users is not correct. The testimony to which he refers (Rec., p. 311) does not bear him out. This is clear from a reading of the cited testimony, and beyond dispute when the context is examined.

The witness was asked on direct examination (Rec., p. 307):

"Q. I will ask you, Mr. Hughes, whether in connection with your official duties with the Red Cross, you ever had occasion to investigate the extent of the commercial use of the Red Cross' name and emblem, or to deal with matters like that. A. During the past 20 years I have handled myself approximately 3,500 separate matters affecting the use and misuse of the Red Cross name and emblem, and since January 1, 1939, I have handled approximately 350 separate cases involving the use or misuse of the Red Cross name and emblem."

On cross-examination the witness testified at p. 311 as follows:

"Q. How many of these commercial companies do you find that use the trade-mark in interstate commerce? A. I have never been able to make a determination in the field of interstate commerce, but there are literally hundreds of companies that have or are making use of the Red Cross name or emblem for commercial purposes.

"Q. And have made use of that since 1905? A. Yes, since 1905.

"Q. You have recognized as a lawyer all the time that those who used the mark prior to 1905, under the very terms of the statute, were given the right to continue the use for the same class as they had previously used it? A. For the same purposes and for the same class of goods.

"Q. 'For the same purposes' meant for legal purposes; did it not?"

Obviously the witness was not talking about pre-1905 users. He was testifying about those that did not come within the exemption of the statute—those who had started their use since 1905, which were largely small, local, intrastate users.

The question presented now to this Court on the interplay of the exemption in the Red Cross Act and the Federal Trade Commission Act does not affect any post-1905 users because they do not come within the exemption, nor does it affect any intrastate users for they do not come within the Federal Trade Commission Act. The witness did not even purport to testify as to the number of the present pre-1905 users.

Those who at some time used the Red Cross for commercial purposes may have been "literally hundreds", particularly if there be included the small intrastate users. But the issue here presented affects only those who come within the exemption, namely the present users whose use extends back prior to 1905. It was, of course, pertinent for the House Committee to inquire how many concerns were still lawfully using the Red Cross and would be affected by the repeal of the exemption. Thus the Chairman of the Committee was prepared to give the answer above quoted, namely that there are six.

**3.**

This application for certiorari is premature. The Circuit Court of Appeals remanded the case to the Federal Trade Commission for further action in accordance with its opinion, but the Commission has not taken any further action. The only reason assigned for presenting the question to this Court in this state of the proceedings is a statement by the Solicitor General that the Commission cannot prevent deception without absolutely preventing the use. This, however, is not a finding by the Commission but merely a statement of counsel.

The Commission has not yet even considered the question of whether it can secure compliance with the Federal Trade Commission Act without the absolute prohibition of the use of the trade-mark in accordance with the opinion of the Court below. The Commission, after due consideration, may well find that it can make an order which meets the requirements of the Federal Trade Commission Act and still permits the respondent to use its trade-mark. In that event the question now presented to this Court falls. Any incompatibility between the two statutes does not arise unless and until the Commission after due proceedings finds that it cannot comply with both.

4.

The Court below was clearly correct in holding that the respondent's right to use its Red Cross trade-mark continues. Petitioner's argument to the contrary is a contention that when Congress created the right in 1910 it did not have in mind the public interest, but this later conception was embodied in the amendment of 1938 to the Federal Trade Commission Act. But nothing is presented to support the contention that Congress was oblivious of the public interest in 1910. Also, in these last few years when Congress has had this matter under active consideration it surely knew of its 1938 amendment to the Federal Trade Commission Act and the policy embodied therein. Nevertheless it has unmistakably expressed its conception that the rights of the pre-1905 users continue until Congress does something about it. We might add that, in the argument below, Commission's counsel stated in open Court, in reply to questions from the Bench, that there was no difference between the respondent and any other pre-1905 user, so that

if the Commission could terminate *instanter* this respondent's use of the trade-mark it could do the same to the other pre-1905 users.

## CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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